In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1020

BENJAMIN TEITELBAUM, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1029

JOHN ROSELLI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1034

MANUEL JACOBS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a six-month jury trial in the United States District Court for the Central District of California, petitioners were convicted of various offenses arising out of participation in an organized scheme to cheat for profit in card games played at the Friars Club in Beverly Hills, California. The essence of the scheme was to induce persons to join in high stake card games and, while the games were being played, to station observers at ceiling peepholes who transmitted playing instructions to confederates by way of electronic signalling devices.

Each petitioner was convicted of conspiracy to violate 18 U.S.C. 1952 (use of interstate facilities for unlawful gambling enterprise), 18 U.S.C. 2314 (interstate transportation of stolen securities) and 26 U.S.C. 7206(1) (filing a false income tax return by failing to report monies obtained from the scheme); each was also found guilty of at least one substantive violation of Section 1952, through use of the telephone and interstate travel, and of substantive violations of Section 2314 through transportation of checks obtained from the card games to and from Las Vegas (see Pet. No. 1020, App. 2). In February, 1969, Teitelbaum and Jacobs were sentenced to imprisonment for terms totalling four years and Roselli was sentenced to terms totalling five years; fines in varying amounts were also imposed. The court of appeals affirmed in a comprehensive opinion which sets forth the relevant facts and discusses in extensive detail the major contentions asserted by petitioners in this Court (Pet. No. 1020, App. 1-36). In the main, we rely upon that opinion; we believe it appropriate, how-

ever, to address ourselves to certain of the contentions raised by petitioners.[1]

1. Petitioners assert that the court of appeals erred in ruling that, in order to hold a defendant liable as a conspirator, it was not necessary for the government to show that he knew of or reasonably could be held to anticipate the interstate aspects of the agreement (Pet. No. 1020, App. 13-16); this, it is said, is contrary to the orthodox view that the federal element must be within the contemplation of the conspiracy.[2] *Pereira* v. *United States*, 347 U.S. 1, 11-12. The different analysis adopted below, however, does not warrant the granting of certiorari in view of the court's alternative ruling that the evidence was sufficient to show actual knowledge or reasonable contemplation that interstate facilities and interstate travel would be involved.[3] Indeed, this was the basis

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[1] The petition in No. 1034 (Jacobs) is out of time under Rule 22(2) of the Rules of this Court, having been filed 31 days after the denial of the petition for rehearing.

[2] But see our discussion in our Memorandum in Opposition in *United States* v. *Blassingame*, 427 F. 2d 329 (C.A. 2), petition for certiorari pending, No. 5562, involving the Second Circuit's view as to the proof necessary to make out an offense under the mail fraud statute (18 U.S.C. 1342). We are providing counsel for petitioners with a copy of our Memorandum in *Blassingame*.

[3] Although the court of appeals specifically dealt in detail with knowledge in this regard only as to petitioner Teitelbaum (Pet. No. 1020, App. 16-18), the court's opinion indicates, as the trial evidence shows, that the other petitioners were actually aware or could reasonably be presumed to be aware of the interstate elements of the agreement (see Pet. No. 1020, App. 21-22).

upon which the case was tried and the trial court's instructions unequivocally directed the jury that to convict on the conspiracy charges it had to find "knowledge" regarding the interstate aspects of the scheme.* This instruction complied with the principle stated in *Pereira* v. *United States*, 347 U.S. 1, 8-10; see also, *Nassif* v. *United States*, 370 F. 2d 147, 152-153 (C.A. 8); *United States* v. *Mingoia*, 424 F. 2d 710, 712 (C.A. 2); no conflict has thus been created which this Court should resolve.

2. The contention that the card cheating enterprise did not come within the proscription of Section 1952 because it was not a business enterprise involving gambling under California law was thoroughly canvassed and properly rejected by the court below (Pet. No. 1020, App. 3-9). We add that there is no reason to defer disposition of the instant petitions because of

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* The trial judge instructed on the conspiracy charge (count one) as follows (Tr. 703-704):

> With respect to [the conspiracy count] it is not sufficient for the Government to prove that one or more of the defendants agreed to participate in, or to become a member of, a conspiracy to cheat at cards at the Friars Club. That isn't enough. Before a defendant may be found guilty of Count One of the indictment, the Government must prove that such defendant specifically agreed to the use of illegal interstate facilities, or directly agreed to a scheme which could not be consummated without the use of illegal interstate transportation or facilities, or agreed to a scheme in which it was shown that the likelihood of the use of illegal interstate transportation or facilities was great, • • • or that he evidenced his indirect agreement by substantial participation in the scheme with actual knowledge of the proposed or completed use of illegal transportation or facilities.

the grant of certiorari in *Perez* v. *United States* or *Rewis* v. *United States*, Nos. 600 and 5342 respectively, this Term. *Perez* deals with a totally different statutory scheme where Congress sought by formal findings to avoid the requirement of proof in each individual case that there had been an effect on commerce; *Rewis* involves the entirely different issue of whether, in the particular circumstances of that case, petitioners induced the interstate travel of others to a gambling establishment. Nor is *United States* v. *Nardello*, 393 U.S. 286, inconsistent with the ruling below (Pet. No. 1029, pp. 11-12). Indeed, in *Nardello*, this Court cut through form to substance to give the statutory provision its intended reach.

3. The other individual claims of the petitioners are also fully treated in the opinion below and justify but summary comment.

a. The government introduced telephone toll records reflecting interstate calls between petitioner Jacobs' residence in Los Angeles and locations of other members of the conspiracy during its pendency. In view of the other evidence of record tying Jacobs to the conspiracy, the court below concluded that the jury was properly permitted to consider that the calls were made by Jacobs and related to the conspiracy (Pet. No. 1020, App. 22-23). Petitioner Jacobs now contends that the admission of the toll records violated Section 605 of the Federal Communications Act (47 U.S.C. 605). The decisions are, however, uniformly to the contrary. *United States* v. *Covello*, 410 F. 2d 536, 540-542 (C.A. 2) and cases cited, certiorari denied, 396 U.S. 879; see also *Nolan* v. *United*

States, 423 F. 2d 1031, 1043-1045 (C.A. 10); *DiPiazza* v. *United States*, 415 F. 2d 99, 101-103 (C.A. 6), pending on petition for a writ of certiorari, No. 67, this Term.

The cases from the Ninth Circuit relied on by petitioner (*United States* v. *Johnson*, 429 F. 2d 430, and *Osborne* v. *United States*, 371 F. 2d 913) do not deal with Section 605 but with the argument, properly rejected below, that there was insufficient evidence to identify the caller or recipient.[5]

b. Petitioner Roselli contends (Pet. No. 1029, pp. 15-17) that the district court erred in deferring, until after the trial, the hearing on his motion to suppress evidence on grounds of illegal electronic surveillance; he also argues that there were various infirmities in the hearing on that issue. In rejecting this claim, the court of appeals relied on its prior decision (set forth in pertinent part in Pet. No. 1029, 51a-54a) involving a separate conviction of petitioner in which it rejected essentially the same claims (Pet. No. 1029, p. 47a). In a recent case identical arguments were rejected by the Ninth Circuit and this Court denied certiorari. *United States* v. *Sacco*, 428 F. 2d 264, 272-274 (C.A. 9), certiorari denied, November 9, 1970 (No. 556, this Term).

c. Petitioner Teitelbaum's claims of error (Pet. No. 1020, pp. 25-43) regarding government cross-examination of certain of his witnesses are amply

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[5] Jacobs' claim of prejudicial joinder (Pet. No. 1031, 10-18) is fully answered by the court below (Pet. No. 1029, App. 25-31) and requires no discussion here.

answered below. It is further claimed that the jury was improperly informed of the fact that two witnesses subpoenaed by the government had claimed the privilege against self-incrimination. As the court below stressed, there is not the slightest evidence of a prosecutorial attempt to build its case in this fashion or of prosecutorial misconduct. The court below disapproved, as a general matter, questioning a witness before the jury after he claims the privilege or advising the jury of a claim asserted outside its presence. It found, however, no reversible error in the circumstances of this case (see Pet. App. 1020, App. 31-34). This assessment of a particular factual context should provide no occasion for plenary review.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1971.